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November 2, 1998

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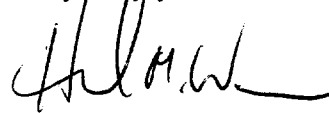
Re: MM Docket 98-162
RM-9263
Sugar Hill and Toccoa, Georgia

Dear Ms. Salas:

Transmitted herewith, on behalf of LBJB Broadcasting Company, L.P., are an original and four copies of its "Comments" in the above-referenced proceeding.

Should any further information be required concerning this matter, please communicate with this office.

Very truly yours,



Howard M. Weiss

Counsel for LBJB Broadcasting Company, L.P.

HMW/jr

Enclosures

cc: Gary S. Smithwick, Esquire (with encl.)

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ORIGINAL

BEFORE THE

Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 98-162
Table of Allotments,) RM-9263
FM Broadcast Stations.)
(Sugar Hill and Toccoa, Georgia))

Directed to: Chief, Allocations Branch

COMMENTS

LBSJ Broadcasting Company, L.P. ("LBSJ"), by its attorneys, hereby respectfully submits its Comments with regard to the *Notice of Proposed Rule Making*, DA 98-162, released September 11, 1998 ("NPRM"), in the above-captioned proceeding. With respect thereto, the following is stated:

1. In the *NPRM*, the Commission specifically requested comment concerning the continuation of its policy articulated in *Newnan and Peachtree City, Georgia*, 7 FCC Rcd 6307 (1992) ("*Newnan/Peachtree City*"). Pursuant to that policy, a "grandfathered" (pre-1964),¹ short-spaced station which proposed no changes in its channel or technical facilities was allowed to change its community of license in an allocations proceeding. The Commission reasoned that such stations, which had been in compliance with the Commission's Rules when authorized, should in fairness be allowed the same opportunity to change community of license as other

¹ The term "grandfathered" short-spaced station refers to those FM stations at locations authorized prior to November 16, 1964, that did not meet the separation distances required by the later adopted Section 73.207 of the Commission's Rules, and have remained short-spaced since that time.

stations authorized in accordance with the Rules.

2. LBJS strongly supports continuation of the policy set forth in *Newnan/Peachtree City*. Like Southern Broadcasting of Pensacola, Inc., the petitioner in the instant proceeding, LBJS has sought an amendment of the FM Table of Allotments to change the community of license of a grandfathered short-spaced station without changing the station's technical facilities.² The amendments proposed would allow both Petitioner and LBJS to provide a first local aural transmission service to the new community. Thus, the proposed reallocations would serve the public interest by providing a preferential arrangement of allotments. *Revision of FM Assignment Policies and Procedures*, 90 F.C.C.2d 88 (1982).

3. The benefit of providing a first local service would be achieved without any actual countervailing public interest detriment. The Commission has noted that the proposed amendment would create a "new" short-spaced allotment. *NPRM* at ¶¶4-5. In essence, however, the reallocation would preserve the *status quo*. While the name of the community having a short-spaced allotment would change, the total number of short-spaced allotments would remain the same. Moreover, since no change in channel or technical facilities is proposed, there would be no increase in potential interference with any other station. Thus, the proposed reallocations would have no impact on the integrity of the FM band.

4. The Commission has in the past refused to make new allotments which were in contravention of the spacing requirements of Section 73.207 of its Rules. *See, e.g., Front Royal*,

² See "Notice of Proposed Rule Making," *Killeen and Cedar Park, Texas*, DA 98-1939, released September 25, 1998. In this Notice of Proposed Rule Making, the Commission also seeks comment concerning the continuation of the *Newnan/Peachtree City* policy.

Virginia, 9 F.C.C.2d 18 (1967); *Vass, North Carolina*, 45 R.R.2d 1741 (B/cast Bur. 1979); *Millington, Maryland*, 45 R.R.2d 1686 (B/cast Bur. 1979). In those instances, however, the proposed new short-spaced allotments involved either an increase in the total number of short-spaced allotments in the Table of Allotments or an exacerbation of an existing short-spacing. Therefore, there was a basis for concern about an increase in actual interference and potential degradation of service to the public. Such is not the case here, however. There will be no degradation of the FM band in that the total number of short-spaced allotments will remain the same, and there will be no change in technical facilities. In these circumstances, no member of the public will suffer any loss of service, nor would any station experience any impact on its technical operations. Therefore, the basis for the Commission's prior rulings is inapplicable in this case.

5. Furthermore, the Commission has in the past made exceptions to the strict application of Section 73.207 in the allotment context. For example, in *East Los Angeles, Long Beach, and Frazier Park, California*, 10 FCC Rcd 2864 (M. Med. Bur. 1995), the Commission allowed a grandfathered short-spaced station to change community of license and transmitter location, despite the fact that the new location also would be short-spaced. The Commission found in that instance that there would be no increase in interference potential, and there would be an increase in the number of persons served. Clearly, in the instant case, similar reasoning would apply. Since no technical changes are proposed, there can be no increase in interference potential. The end result in both instances is the exchange of one short-spaced allotment for another, but, in both situations, public interest benefits -- either additional service or a first local service -- would be achieved.

6. In *St. Augustine, St. Augustine Beach, and Gainesville, Florida*, 7 FCC Rcd 7657 (M.Med. Bur. 1992), a station short-spaced to a third-adjacent channel station sought to change its channel so that it would operate on a second-adjacent channel. There, as here, no change in transmitter site location or technical facilities was proposed. In that case, the Commission noted that the spacing requirements are the same for second- and third-adjacent channels. Accordingly, the Commission found that there was no basis to distinguish between the proposed new allotment and the existing allotment, as the protection afforded the short-spaced station would be the same. Thus, the Commission considered the lack of effect upon the short-spaced station in concluding that a new, short-spaced channel should be allotted. *Id.*

7. The same rationale would apply to the instant proceeding. Just as there is no basis for distinguishing between a short-spaced second- or third-adjacent channel, there is even less rational basis for distinguishing between a short-spaced allotment at one community as opposed to another. Likewise, as in *St. Augustine, St. Augustine Beach, and Gainesville, Florida*, the proposed change in allotment will have absolutely no impact on the potential amount of interference received by the short-spaced station. Thus, it would be irrational and contrary to the public interest to find that a change in a short-spaced allotment from a third-adjacent to a second-adjacent channel would be permissible, while a mere change in community of license would be impermissible.

8. The Commission also has taken into account considerations of fundamental fairness in making allotments which did not comply with the spacing requirements then in effect at the time at which they were made. In one case, the Commission made an allotment which did not comply with the requirements of Section 73.207 at the time that the order was issued, on the basis that

the petition for rule making had been filed prior to the effective date of new requirements and had been in compliance with applicable spacing requirements at the time filed. *Oak Beach and Bay Shore, New York*, 59 R.R.2d 1652 (M. Med. Bur. 1986). Thus, the Commission has allowed flexibility in cases in which an allotment or proposed allotment originally was in compliance with the Commission's Rules, but because of subsequent changes, no longer met spacing requirements. Likewise, in the instant proceeding and in *Killeen and Cedar Park*, the grandfathered short-spaced stations were in compliance with the Commission's Rules at the time that they were authorized. Fundamental fairness therefore requires that such stations not be forever barred from changing communities of license simply because of a later change in the Commission's Rules. The Commission has taken such equitable considerations into account in the past and ought to continue to do so in cases such as the instant proceeding.

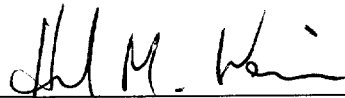
9. Additionally, while it is possible that a licensee which has changed its community of license might at some point in the future also seek a technical change in its facilities, such considerations are irrelevant in this proceeding. The Commission has recently reiterated that speculation in an allotment proceeding as to future application plans is just that, speculation. *Warrenton and Enfield, North Carolina and LaCrosse and Powhatan, Virginia*, DA 98-1495, released July 31, 1998. Questions as to the acceptability of any future modification application are best addressed in the processing of that application, at which time it will be analyzed for conformity to applicable rules and Commission policies. See *East Los Angeles, Long Beach, and Frazier Park, California*, supra.

10. In sum, continuation of the policy articulated in *Newnan and Peachtree City, Georgia* would serve the public interest. It will allow for preferential arrangements of allotments

in that grandfathered short-spaced stations will have an opportunity to change communities to provide first local service to currently unserved communities, as Section 1.420(i) contemplates. The total number of short-spaced allotments will remain unchanged, the quality of FM broadcast reception will be unaffected. Thus, LBJs strongly urges the Commission to retain the policy set forth in *Newnan/Peachtree City*.

Respectfully submitted,

LBJs BROADCASTING COMPANY, L.P.

By: 
Howard M. Weiss
Anne Goodwin Crump

Its Attorneys

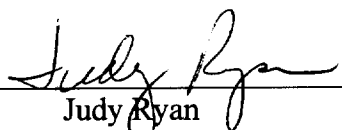
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November 2, 1998

CERTIFICATE OF SERVICE

I, Judy Ryan, certify that the foregoing Comments of LBJB Broadcasting Company, L.P. were served this 2nd day of November, 1998, via United States First Class Mail, prepaid, upon the following:

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Smithwick & Belendiuk, P.C.
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Judy Ryan